Supreme Court, U. S.
FILED
MAY 27 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 1,004,
OCTOBER TERM 1942

KEAL DRIVEWAY COMPANY, a corporation, and R. S. BUNNELL,

Petitioners,

versus

CAR & GENERAL INSURANCE CORPORATION, a corporation,

Respondent.

BRIEF OF RESPONDENT

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REPLY TO PETITION

Jurisdiction of this Court is asserted by petitioners under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925, 43 Statutes 938 (U.S.C.A. Title 28, Sec. 347a), and it is claimed by them that the decision of the Circuit Court of Appeals is in conflict with applicable local decisions.

A short review of the essential facts in this case is a complete answer to the petition, and will also explain the basis of the decision of the Circuit Court of Appeals,

which reversed the decision of the Trial Judge for failure to give requested instructions on the subject of sudden peril or imminent danger. For the sake of brevity and convenience, I will refer to petitioners as defendants, and to respondent as plaintiff.

Plaintiff alone, driving a Ford sedan, and defendant alone, driving two automobiles fastened together tandem fashion, were approaching each other from opposite directions at about ten o'clock in the morning on a clear day upon a straight, level highway, paved with concrete and twenty feet wide and with a center stripe down the middle. Neither was driving at an excessive rate of speed and they had a head-on collision. This colllision was not in the middle of the pavement as asserted by petitioners, but was definitely over on plaintiff's right hand side of the center stripe, or definitely on defendant's right hand side of the center stripe. There were no eye witnesses and, as to the above, there was no conflict in the evidence except as to the side of the highway where the colllision occurred. (Tr.-49 et seq.—Tr.-136 et seq.)

When plaintiff first saw defendant's tandem it was about one-quarter of a mile away and was on its left side of the road, but it turned back immediately and in doing so ran to its right side of the road. (Tr.-49).

There never has been any contention that plaintiff should have stopped or left the road on account of the conduct of the tandem one-quarter mile away. From then on then on the situation was normal until the cars were about from one to two hundred feet apart and then the plaintiff noticed that defendant's driver had slumped down away from the wheel and was not in sight.

"Q. And you came to that realization when the car was 100 to 200 feet away from you?

A. Yes sir." (Tr.-62)

At the rate of speed both drivers were traveling, it was less than one second later that the collision occurred. Plaintiff swore that when defendant's tandem was just a few feet away, it lunged across the center stripe and hit him head on. (Tr.-49). Defendant's driver swore to exactly the reverse, that just before they met, plaintiff crossed the center stripe and hit him head-on. (Tr.-136). Each driver swore that he always stayed on his side of the road. Mr. Campbell said:

"Q. Did you ever at any time get across on the left hand side of the road after you first saw the automobile approaching?

A. No sir." (Tr.-50)

Defendant's driver also testified.

"——and when he came within two or three car lengths of my car, he suddenly swerved in my direction.——"

"Q. At the time of the impact, what, Mr. Bunnell, was the position of your car or cars on the highway?

A. My car was straight down the road.

Q. What side of the road?

A. On my side of the highway." (Tr.-136)

The only material conflict in the evidence was as to where the collision took place. Each driver asserted vigorously that he remained on his side of the road and that the other crossed to his side and hit him. Therefore, there was no question of contributory negligence involved in the

case. It was simply a question as to which driver's conduct was the sole, proximte cause of the collision. However, the learned trial judge thought that even if the plaintiff's version was true, he might be guilty of negligence in failing to stop or in failing to turn off the highway in the interval of time between the time when he first realized that there was no one at defendant's wheel, and the time of the collision. At the rate of speed both drivers were traveling, this time was about one second. In his charges, the trial judge said:

> "Now whether or not Mr. Campbell was negligent from that instant on, and whether his negligence if any contributed proximately to the cause of accident it is for you gentlemen to determine; and his conduct—Mr. Campbell's conduct, in the operation of his car by him from that time on, when he observed—as he stated to you that he observed—that there was no one at the control of the defendant's car—his conduct from there on is to be measured by what a man of ordinary prudence and care would have done under like circumstances." (Tr.-169-170).

When plaintiff first noticed that no one was visible at the wheel of the oncoming tandem, his first feeling was one of curiosity (Tr.-60). This was quite natural. The tandem was only about twenty feet away from plaintiff when it turned and started across the center stripe. In estimating the position of the tandem when it turned, plaintiff said:

> "It could have been 20 or 18 or 16 feet. But it was so close that I had no time to do anything." (Tr.-63)

ARGUMENT

If the exercise of due care required plaintiff to do something in order to avoid a collision when he first realized that no driver was in sight back of the wheel, he had about one second to decide what to do and to do it. If he should have done something at the time the tandem turned towards him, he had only about 1/100 of a second to decide what to do and to do it. According to his evidence, the plaintiff did not realize that he faced a danger or peril, either sudden or otherwise, until the tandem turned towards him.

The trial judge told the jury that it was for them to decide if plaintiff acted with reasonable care during that period of time from when he first realized that no one was at the wheel until the time of the collision. In considering that question, the time element was of the utmost importance. The very pith of the situation was the suddenness of the peril or danger. Therefore, the court's charge in this case was misleading and incomplete unless it also included some reference to the time element involved and to the suddenness of the peril.

We took the position at the trial, and we still think we are correct, that no question or issue of contributory negligence was presented by plaintiff's testimony. That no one could reasonably assert that plaintiff was guilty of contributory negligence according to his own statement. That the only jury issue was which driver's conduct was the sole, proximate cause of the collision. Therefore, after the trial judge instructed the jury that plaintiff's version of the events transpiring during the last fraction of a second before the collision, might be contributory negligence, we requested, and the court refused, to give the following instructions.

"Gentlemen, I have previously charged you regarding ordinary care in cases of this kind. In addition to what I have already said on that subject I further charge you that ordinary care does not require one meeting an emergency to act at all events, where he has no time to decide what to do or to think of anything to do; and, if you find from the evidence in this case, that Mr. Campbell had no time in which to decide what to do or think of anything to do between the time he discovered, as he says, that no one was operating Mr. Bunnell's car and the time of impact of the two cars then Mr. Campbell would not be guilty of contributory negligence and you should so find." (Tr.-41.)

"When one is required to act suddenly and in the face of imminent danger, he is not required to act as if he had time for deliberation and the full exercise of his judgment and reasoning faculties. This is especially true where the peril has been caused by the fault of another. Ordinary care to avoid injury is all that is required. The test is, did he act as a reasonably prudent man would have acted under the same or similar circumstances. When a person exercises the care and caution in an emergency which an ordinarily prudent person would have used under the same or similar circumstances he is not negligent merely because he fails to exercise the best judgment, or does not take the safest course, or take every precaution which from a careful review of the circumstances it appears he might have taken, or, in attempting to escape the danger under such circumstances put himself in a more dangerous position. Ordinary care does not require one meeting an emergency to act at all events,

where he has no time to decide what to do or to think of anything to do." (Tr.-42)

Now, there is nothing unusual or distinctive in the sudden emergency principle as treated and applied by the Florida decisions. The decisions on this subject follow the same rules as laid down in Corpus Juris and American Jurisprudence and other texts, as will appear from the following two quotations from recent decisions.

> "Negligence. Acts done under stimulus of sudden peril or in case of emergency requiring immediate action are not to be judged by same standard as that applicable where actor has ample time for reflection and intelligent choice of means."
> Headnote 5, Cook v. Lewis K. Liggett Co. Inc., 173 SO. 159, 127 Fla. 369.

> "Negligence. Person placed in sudden peril by negligence of others is not held to same degree of presence of mind and care which is required under ordinary circumstances."

> Headnote 10, Hull v. Laine, 173 So. 701, 127 Fla. 433.

The charges which we requested on this subject were taken almost verbatim from the text in 45 C. J. 710.

We contend that the decision of the Circuit Court of Appeals is not in conflict with the applicable local decisions on this subject, and the application for Writ of Certiorari should be denied.

Respectfully submitted,

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